In the

Supreme

JOHN M.

Plaintiffs in Error,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

Upon Motion of Defendant in Error to Dismiss and Affirm.

ROBERT E. DeFOREST,
GEORGE F. CARROLL,

of Counsel for Plaintiffs in Error.

Address, Bridgeport, Conn.

S. M. Quintard, Printer, Main corner, Bridgeport.

Supreme Court of the United States,

October Term, 1899.

JOHN M. WHEELER and WILLIAM T. HOWES
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

No. 534.

BRIEF FOR PLAINTIFFS IN ERROR

On Motion of Defendant in Error to Dismiss and Affirm.

STATEMENT.

The printed document purporting to be a "transcript of the record" is incomplete as a copy of the record actually certified to this Court by the Clerk of the Connecticut Supreme Court of Errors, and it does not fairly present the case so as to enable the plaintiffs in error by their brief to argue or sufficiently to indicate the federal question that they believe to be involved.

On page 9 of the transcript appears an application by the Railroad Company, the defendant in error, addressed to a judge of the Superior Court of Connecticut for the appointment of appraisers to estimate the damages that will arise to Wheeler & Howes, the plaintiffs in error, from the taking of certain real estate belonging to them.

By paragraph 4 of the application (transcript, p. 9) it appears that a certain agreement referred to in paragraphs 1–3, and

certain plans referred to therein and made a part of said agreement, are made a part of the application as Exhibits A and B respectively.

Said Exhibit A is, indeed, printed in the record.

But said Exhibit B, consisting of the plans made a part of the agreement, is not printed as a part of the record. See Transcript, p. 14.

Now these plans, taken in conjunction with the agreements, being Exhibits A and B, present the points of the case essential to raise the Federal question.

These plans were duly certified up to this Court by the clerk of the Connecticut Supreme Court of Errors and are an integral part of the record in this case.

From these plans it appears as matter of law that the land of the Wheeler & Howes is neither needed nor wanted by the Railroad Company for the purpose of eliminating any crossings at grade of its railroad tracks over highways, and that the allegation in the application that said land was wanted for that purpose is absolutely false and untrue.

The facts are, as appears from an inspection of Exhibits A and B, that three persons, authorized by the Legislature to make an agreement in behalf of the City of Bridgeport with the Railroad Company, for the purpose of eliminating grade crossings in Bridgeport and of determining what proportion, if any, of the expense of so doing should be borne by the city, did sign an agreement with the Railroad Company in which the Railroad Company agreed to do certain work whereby its tracks should be separated from the grade of the intersecting streets, but whereby certain other work should be done by the Railroad Company *not necessary or germane to such grade crossing elimination, and whereby the City of Bridgeport should pay a large portion of the expense of such entire work, both germane*

and non-germane to the work of grade crossing elimination. It further appears from said plans that the land of Wheeler & Howes is wanted *for the carrying out of a part of the work agreed upon that is not necessary or germane to the work of grade crossing elimination.*

The particular features of the work to be done and for which the city was to contribute that are not necessary or germane to the work of grade crossing elimination. are set forth in the second and eighth reasons of demurrer of Wheeler & Howes to the application of the Railroad Company, and may be summarized as follows:

a. A part of the expense of building an elevated structure for two extra tracks on a part of the present right of way.

b. A part of the expense of acquiring land for the purposes set out in the resolution passed by the Railroad Company's board of directors and nakedly set out in par. 5 of the application.

c. Particularly a part of the expense of acquiring land for the purpose of lessening the radius of the curves in the Company's railroad, which land in part, will be that described in par. 6 of the application and belonging to Wheeler & Howes.

d. A part of the expense of building a four track drawbridge between two pieces of land outside of the present layout and as an incident of such change of layout.

e. A part of the expense of building an elevated structure for four tracks on the outside land so acquired and to be acquired.

f. A part of the expense of building a spur track at grade with present highways.

It is also duly claimed in the demurrer that the taking of the land of Wheeler & Howes under those circumstances will be

contrary to the provisions of the 25th Amendment to the Constitution of Connecticut and to Sec. 1 of the 14th Amendment of the Federal Constitution. See transcript, pp. 18 and 19.

The part of the XXVth Amendment here material reads as follows:

"No County, City, Town, Borough, or other municipality, shall ever subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of any such corporation."

Under Connecticut practice this assignment of constitutional questions in the demurrer was sufficiently explicit to permit of argument and to compel an adjudication thereon. This is so conceded in the opinion of the Connecticut Court. We mention the point for the sake of avoiding any misapprehension.

This demurrer was overruled by the trial judge, (transcript, p. 19).

Wheeler & Howes then filed their answer, one defense being substantially a general denial and the other being a special defense setting up as allegations of fact the same matters that were set forth in the demurrer as allegations of law. This course was pursued since it was feared that the State court might hold these facts did not appear ar conclusions of law, but were only averable as allegations of fact.

The Connecticut Court held, however, that these matters were correctly stated as allegations of law and that Wheeler & Howes were correct in their interpretation of the agreement and plans, and therefore the second defense was unnecessary. See the fourth paragraph and also the last full paragraph of Judge Hall's opinion announcing the decision of the Connecticut Supreme Court of Errors, (transcript, pp. 36, 41 and 42).

Wheeler & Howes again made—and adequately made—the

same claims of constitutional law upon the trial of the issue of fact raised by their first defense, and were overruled. See transcript, pp. 22–24.

The Connecticut Court in Judge Hall's opinion nowhere contends that the constitutional questions, whether State or Federal, were not adequately raised before the trial judge; neither is it asserted that the adverse action of the trial judge was not sufficiently assigned as error so as to bring up the same questions before the Connecticut Supreme Court of Errors.

These claims of constitutional law and the facts upon which they are predicated are set forth appearing in the transcript on pp. 5–8, 18, and 24.

In the opinion it is said:

"The defendants object to the appointment of appraisers upon the grounds *that the plaintiff has no right to take this property.* * * * The reasons of the defendants' claim that the railroad company *has no right to take the land in question* are fully set forth in the demurrer to the application and in the claims made by the defendants upon the trial of the issue raised by the first defense.

* * * * * * *

"Second. If the agreement was executed in the manner contemplated by the act, because the provisions in said agreement or order, apportioning the cost of the work between the railroad company and the city, and imposing upon the latter the burden of paying a one-sixth part, not exceeding $400,000 of the entire cost of constructing a four-track elevated railroad through the city of Bridgeport, in place of the existing double track railroad, *is in contravention of the 25th amendment of the State constitution and of section 1 of the 14th amenement of the Constitution of the United States,* and that therefore said agreemeent and order and the special act under which they were made are void and confer no authority upon the railroad company to perform the work in question or *to take the defendants' property by this proceeding.*"

See transcript, pp. 36 and 37.

The above questions show conclusively that before the high-

est court of Connecticut, Wheeler & Howes claimed that to permit the Railroad Company to take "the land in question"—described as property of Wheeler & Howes on p. 10 of the transcript—would be a taking of their property without due process of law in contravention of section 1 of the 14th Federal Amendment.

And no inadequate statement in the opinion as to the process of Wheeler & Howes in arriving at such a conclusion as claimed by them can diminish the effect of such a claim. But attention should be called to the inaccuracy of the opinion in stating the reason of the claim made by Wheeler & Howes, as stated in their demurrer, (transcript, p. 18) and in argument at the trial, (transcript, p. 24). This inaccuracy is found on p. 37 of the transcript beginning with the word, "Second." The real claim of Wheeler & Howes, as appears by pp. 18 and 24 of the transcript, was that if *the project of the Railroad Company should be carried out as called for, the agreement with the city and the plans annexed thereto, the taking and condemnation of the property of the Wheeler & Howes would be contrary to the designated State and Federal Constitutional provisions and would be without due process of law.*

And the reason of this claim was, not that it was unconstitutional for the city of Bridgeport to pay for a part of the work for grade crossing elimination, but that, as stated explicitly in the demurrer and also in argument at the trial, *it would be contrary to the 25th Amendment to the State Constitution for the city to pay for the doing of work for the benefit of the Railroad Company, not necessary or germane to the work of grade crossing elimination, and therefore that, as the land of Wheeler & Howes was to be taken to carry out a part of the project, to be paid for in part by the city, not necessary or germane to the work of grade crossing elimination, their property would be taken without due process of law contrary to section 1 of the 14th Federal Amendment.*

Later on in the opinion the claim of Wheeler & Howes is stated with more correctness.

"This is not a proceeding in which the owner of property sought to be condemned attempts to show that it was not in fact ~~(sic)~~ taken for a public use. That the land is to be used by the Railroad Company for the purposes named in the vote of its directors in the construction of a four-track railroad is not questioned.

"The contention of the Railroad Company is that it (the land to be condemned) is to be used either wholly or in part for railroad purposes, which are not germane to the work of removing grade crossings." See transcript, p. 39.

Then the opinion, arguing that the land of Wheeler & Howes will be taken in accordance with due process, and deciding adversely to the constitutional claim now urged, proceeds as follows:

"Whether taken merely to enable the railroad company to straighten its lines and construct additional tracks or taken only for the purpose of constrncting a railroad so as to avoid crossings, the taking is in either case for railroad purposes, and it is a taking for public use * * * can the defendants, by questioning in this proceeding the validity of the apportionment between the city and the railroad company of the expense of the removal of the grade crossings, prevent the plaintiff from constructing, in accordance with these plans, the four-track railroad through the city which the business requires, and from removing the grade crossings in the manner ordered?"—Transcript, p. 39.

This last enunciation of the case is inaccurate. Instead of "questioning" in the manner stated, Wheeler & Howes contended that to take their property in furtherance of and as part and parcel of a scheme whereby the city should pay to a railroad company part of the expense of improving its railroad would be a taking of the same without due process of law.

Later on, however, the opinion states the matter more correctly:

"The defendants contend that by this agreement and order and by the plans made a part thereof the city will not only be

required to pay a part of the cost of elevating the existing double track above the highways, but also to contribute to the payment of the expense incurred by the railroad company in taking land and building a drawbridge and doing other acts for the purpose of constructing two additional elevated tracks not necessary to the work of eliminating grade crossings. It is argued that the act and the agreement and order imposing such an obligation upon the city violates that provision of the State constitution which forbids any municipality from making any donation to a railroad corporation, *and of the Constitution of the United States which forbids the State from depriving any person of property without due process of law;* that therefore the order of the commissioners made under this act, permitting the railroad company to construct its four-track road and requiring it to proceed with the work of the removal of the grade crossings, is invalid, *and that the railroad company cannot under this order or under this act condemn the defendants' land.*" Transcript p. 40.

The Court then refuses to decide whether the imposition of a portion of expense of doing the work, part of which is not necessary or germane to the work of grade crossing elimination is in violation of the 25th amendment of the State Constitution, but as the Court proceeds to argue, even if this is so, this circumstance does not make the taking of the property of Wheeler & Howes, a taking without due process of law.

Here, then, is a fair and square decision adverse to a claim made under the Federal Constitution.

Lastly, we desire to call attention to the railroad company's own profession of its purpose in taking the land of Wheeler & Howes is this:

"In order properly to carry out in any and all particulars, as called for in said plans, the work imposed upon said railroad company by said special Act and agreement and said order and finding of said railroad commissioners, said company deemed it necessary to take all those certain pieces and parcels of land as shown on said plans [including the property of Wheeler & Howes]. Transcript, p. 9, par. 5.

This purpose was found to be true by the trial judge. Transcript, p. 22.

BRIEF.

The motion proceeds upon the ground that there was not raised in the proceedings in the Superior and Supreme Court of the State of Connecticut, any question under the constitution of the United States, within the meaning of the Act of Congress determining the appellate jurisdiction of the Supreme Court of the United States.

The Act of Congress provides that "the Supreme Court of the United States shall have appellate jurisdiction in case of a final judgment or decree in any suit in the highest court of a State where, is drawn in question the validity of a statute of—or an authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority."

The record shows that the plaintiffs in error are the owners of valuable real estate in the city of Bridgeport which they desire to keep for their own business purposes—and have refused to sell to the railroad company, and which the railroad company is attempting to deprive Wheeler & Howes of *in invitem*, by these condemnation proceedings.

These condemnation proceedings are a suit—an action at law—to be governed by the same general principles of justice and rules of practice, as apply to and regulate other actions.

By the well settled and invariable practice in Connecticut, when a party applies to the Court for the appointment of appraisers for the purpose of condemning another's land, the ap-

plicant is bound to show that he has a legal right so to condemn it, and the respondent, the owner of the land, is at liberty to show that the applicant has no such legal right.

If the applicant fails to show such legal right, or if the respondent shows that the applicant has no such legal right, the application must be dismissed.

The showing of that legal right necessarily requires allegations, on the part of the applicant, to which the respondent must demur or answer as the circumstances may require. If an issue of fact is raised, it must be disposed of by the Court upon the law and the evidence as in any other case.

As in any other case, the applicant must stand or fall upon his allegations and his proof. It is not competent for the Court to decide the case upon any other grounds.

If a constitutional question is presented by the allegations and the issues joined thereon—and the Court renders judgment for the applicant against the constitutional right claimed by the respondent upon those issues—the constitutional question cannot be avoided by any suggestions of the Court in its opinion, that the applicant *might have* proceeded in a different manner, and accomplished the *same* purpose in a *constitutional* way.

This, however, seems to us to be the extraordinary method adopted in this case to oust this Court of jurisdiction, and to deprive Wheeler & Howes of any hearing before this Court upon the one vital question, upon which they have made their whole contention, in all the preliminary stages of the controversy.

The railroad company, being the applicant in this matter, when it applied to the Superior Court Judge for the appointment of appraisers, was bound to show its right to condemn the land.

N. Y. &c. R. R. Co. v. Long, 69 Conn. 424.
Edwards v. Stonington Association, 20 Conn. 466.

Evergreen Cemetery Association, v. Beecher, 53 Conn. 551.
Westfield Cemetery Association v. Danielson, 62 Conn. 319.
Williams v. Elting Woolen Company, 33 Conn. 353.
Olmstead v. Camp, 33 Conn. 532.
Todd v. Austin, 34 Conn. 78.
Occum Co. v. Sprague Mfg. Co. 35 Conn. 496.
McArthur v. Morgan, 49 Conn. 347.
Geer v. Rockwell, 65 Conn. 316.

As the sole ground upon which it claimed the right, it set up in its application—

(1.) *A special Act of the legislature of the State of Connecticut.* (2.) A certain contract alleged to have been made between the city of Bridgeport and the applicant *under the provisions of, and by authority of said Act.* (3.) An application by the Railroad Company and the city of Bridgeport to the Railroad Commissioners for their approval of said agreement, *pursuant to the provisions of said Act.* (4.) An approval of said agreement, by said railroad commissioners upon said application so made *pursuant to the provisions* of said Act, and (5). A vote of the directors of the applicant railroad company to take the land here in question, in *order to carry out in any and all particulars as called for in said plans* (being a part of said agreement) the work imposed upon said railroad company by *said special Act and agreement* and said order and finding of said railroad commissioners.

All this appears from the application itself on pp. 9 and 10 of the record.

It appears, therefore, beyond all possible controversy or equivocation, that the only right alleged, shown, or attempted to be shown, by the railroad company here in its original application to the Judge for the appointment of these appraisers,

was an alleged right to condemn this land and take it under and by virtue of, and in pursuance of, and to carry out a certain special Act of the legislature of the State of Connecticut.

That is the ground, the sole ground, the whole ground of the action which the railroad company instituted against Wheeler & Howes, and which was tried before the Judge of the Superior Court and thereupon appealed to the Supreme Court of Errors of the State of Connecticut, and which Wheeler & Howes have brought to this Court upon this writ of error.

The entire proceeding was based upon that special Act of the legislature, and upon nothing else.

The respondents, Wheeler & Howes, in that proceeding demurred, upon the ground that the special Act in question and the pretended contract alleged to have been made under it were unconstitutional and void, as being in conflict with the Constitution of the State of Connecticut, and with Section 1 of Article XIV. of the Amendment to the Constitution of the United States.

The parties were at issue upon that demurrer, the railroad company, the applicant there, the defendant in error here, alleging and insisting upon the constitutionality of that special Act and the pretended agreement under it, as the sole ground of its application—the sole foundation of its claimed right to take the land; and the respondents there, the plaintiffs in error here, asserting its unconstitutionality as against the provisions of the Constitution of the United States above referred to, and claiming immunity, under the Constitution of the United States, from the attempted assault upon their property rights involved in the proceedings.

The demurrer was overruled by the Judge of the Superior Court and he made the same ruling in substance in his final judgment, and both of those rulings were appealed from to the Supreme Court of Errors. See p. 34 of the Record.

All the other points in the appeal were disposed of by the Supreme Court as immaterial.

The questions of evidence, as to the alleged consent of the city to the pretended agreement, were ignored, upon the ground that in the opinion of the Court it was not necessary, under said special Act, that the city should approve of the agreement.

So, the sole question before the Supreme Court of Errors of the State of Connecticut was, that of the constitutionality of the Special Act of the legislature, and the pretended agreement thereunder; a question raised in that Court twice, first, in Wheeler & Howes' appeal from the decision of the Supreme Court Judge in overruling their demurrer, and second, in their appeal from the decision of that Judge in his final judgment overruling their claims as made upon the trial.

The judge of the Superior Court had held the Act to be constitutional. If he had held otherwise the application would necessarily have been dismissed, and no appraisers would have been appointed.

It was the decisive question in the case.

That decision of the Judge of the Superior Court Wheeler & Howes took by appeal for review in the Supreme Court of Errors. Wheeler & Howes claimed that the Judge of the Superior Court erred in holding the Act to be constitutional. If the Supreme Court had held that the decision of the Judge of the Superior Court was erroneous, then the whole action of the Judge of the Superior Court would have been set aside, the appointment of appraisers would have fallen, and the condemnation proceedings would have been at an end.

The Supreme Court, however, found no error, thereby necessarily holding the Act to be constitutional, thereby deciding in favor of the *validity* of the statute, and an authority exercised under a State, the validity of which was drawn in question on the ground of their being repugnant to the Constitution of the United States; thereby also deciding against the title, right,

privilege and immunity specially set up and claimed by the land owner under the Constitution of the United States.

There were no other material issues or claims involved in that decision—and they *were* involved, *necessarily* involved.

It passes our comprehension, therefore, how it can be claimed that they were not.

It would be no more surprising, it seems to us, if it should be seriously argued that this case had never had any existence at all, and that all the proceedings from beginning to end were merely the figment of a disordered imagination.

Of course, we are aware that in the opinion of the Court various suggestions are made with a view to obviating the Constitutional issue.

It is said that the Railroad Company might proceed under the general law, without regard to the special Act in question. But the trouble is that the Railway Company *did not*. It had its eye on the money that it expects to take from the pockets of Bridgeport taxpayers for its own private advantage, and in violation of the Constitution of the State of Connecticut, under the disguise of grade crossing elimination.

The general law of the State upon that subject did not offer such advantages. Therefore the Railroad Company resorted to the legislature, and having by its well known agencies and methods there obtained the desired contrivance, it proceeded to make use of it. By and by it expects to come to the city with its bill for several hundred thousand dollars to assist it in paying land damages incurred in these proceedings. If the bill is questioned, it proposes to say, "why I have taken this land under the special Act, which provides that we may levy one-sixth of all the expense of our own new railroad plant from border to border of the city of Bridgeport upon the taxpayers of that city."

Therefore, however interesting the theory set out in the opinion of the Court may be that the railroad corporation *might* have proceeded under the general law, the simple truth is, on the record of this case, which cannot be gainsaid or

ignored, that the Railroad Company *did not proceed* under the *general* law, but under this special Act. The suit it instituted against Wheeler & Howes was based from beginning to end on that special Act. The only issues in the case, passed upon by the Supreme Court and upon which the whole case turned, were the issues before referred to, both involving, and indeed consisting of, the one question of the validity of that Act under the Constitution of the United States.

There is another suggestion in the opinion of the Supreme Court of Connecticut which aims at the avoidance of the constitutional question.

It is said that there are two sides to the special Act in question; one which provides that the Railroad Company and the three persons named in the Act may construct a contract for the city, and that then the city or Railroad Company, or either, may take land to carry out the provisions of that contract; another which provides that if such a contract is not made, then the railroad commissioners may order the work done and determine how it shall be paid for; and that therefore whether the first part of the Act is constitutional or not, and whether the alleged contract was void or not, yet the Railroad Company might have taken this land under the second part of the Act, inasmuch as it appears that the scheme, as indicated in the alleged contract, had met the approval of the railroad commissioners.

The answer to that suggestion is, whether or not the Railroad Company *might have* proceeded under the second part of the Act, *it did not do so.* It *did* not allege in its application, in the suit it brought against Wheeler & Howes—the suit that said Wheeler & Howes defended—the suit that the Superior Court Judge tried and decided—the suit that was taken to the Supreme Court for review and was there tried and decided;—in *that suit* the Railroad Company *did not* allege that the city and Railroad Company *failed* to make the contract provided for in the first part of the statute, and that *therefore* the rail-

road commissioners adopted the scheme, plan, and specifications described in the record; and that the Railroad Company is now seeking to condemn this land on *that* ground. Not at all. That would have been an entirely different suit, calling for entirely different pleadings and issues and evidence, and involving other and different questions.

The two theories of proceedings, the one suggested by the Court, and the one actually adopted in the case by the applicant, are not only widely different, but are inconsistent with each other—so inconsistent that they could not be combined in one proceeding. The allegation of one, gives the lie to the other. Especially under the Connecticut code of practice, which requires truthful statement and condemns fictions, or allegations not believed to be true, how could these two theories be reconciled and advanced in one application?

The railroad commissioners had no *jurisdiction* to proceed independently under the special Act at all, *except* in case *no agreement* was reached, as provided for in the first part of the Act. If an agreement *was* reached, all the commissioners could do was to approve or disapprove. If they approved, that perfected the scheme as contemplated under *that* part of the Act.

Now, the *allegation* is that the agreement *was made.* The application is brought pursuant to the agreement and to carry out its provisions.

The Court says in its opinion (Record, p. 41) "The two purposes of the Act of 1895 were first, the removal of all existing grade crossings in Bridgeport, and the construction in the most feasible manner, after considering the interests of the public, the rights, responsibilities, and duties of the railroad, and of the city, and the rights of other parties concerned, of a four-track railroad through the city in such a way as to avoid crossing any highway at grade; and second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so in-

tended to be by the Act, that neither the right of the railroad company to perform the work, according to the plans approved by commissioners, nor the power of the commissioners to compel its performance, depend upon a previous apportionment of the expense between the parties who should bear it. Section 12, as we have already said, provides that if no agreement shall have been made, as authorized by section 2, the commissioners after the work shall have been completed, shall apportion the entire expense among the proper parties."

This is the argument of the Court to show that in this case the question of the constitutionality of the first part of the statute and of the pretended contract are not drawn in question.

"If no agreement shall have been made."

But the application proceeds upon the supposition and allegation that such an agreement *has been made*, thereby necessarily implying that the Act in authorizing the agreement, and the agreement made under it, are valid in all respects.

If that allegation was not true, the applicant failed to make out the case, and the judgment should have been in favor of Wheeler & Howes.

If it was true, the commissioners had no power to apportion the expense of the work among the proper parties after it was completed, for that matter was disposed of by the agreement, and the case supposed by the Court has no possible connection with the one under consideration.

In the case actually before the Court—the case set up in the application—the right of the railroad company to perform the work, according to the plans approved by the commissioners, and the power of the commissioners to compel its performance, *did* depend entirely upon the previous apportionment of the expense between the parties who should bear it.

Because that apportionment was an essential and inseparable feature of the alleged agreement, it could not be elimin-

ated and leave any agreement at all, and the right alleged and claimed and disputed and passed upon by the Court was a right *to proceed under that agreement and nothing else*, and that question necessarily involved the question of its constitutionality of the agreement and of the Act under which it was claimed to be made.

We, therefore, with all due respect, beg leave to say that the argument by the Court, in its opinion, has no relevancy whatever to the case before it or to the judgment it rendered.

Moreover, if the case was such as supposed by the Court, even then the constitutional question was necessarily involved.

It was still a question of the validity of some portions of the Act in question, and the claim set up by Wheeler & Howes was that the *entire Act* was *necessarily unconstitutional*, because of *some of its inseparable features*.

If the Court holds any part of the Act to be constitutional against that claim, it is within the jurisdiction of this Court to review the judgment. Moreover, whether the statute is severable, and one part can be held constitutional without tainting the other part, are questions necessarily involved in the claim made by Wheeler & Howes under the constitution, and are therefore reviewable here and within the jurisdiction of this Court for that purpose.

Foster vs. Kansas, 112 U. S. 205.
Chicago B. & Q. R. R. Co. vs. Chicago, ~~166~~ 166 U. S. 205.
Kantuana Water Power Co., vs. The Green Bay & M. Canal Co., 142 U. S. 254-282.
Wilson vs. Black River Creed Marsh Co., 27 U. S. (2 Peters) 245.
Armstrong vs. Athens Co., 41 U. S., (16 Peters) 281.
Chicago Life Ins. Co. vs. Needles, 113 U. S. 574.
Eureka Lake and T. Canal Co. vs. Yuba County, 116 U. S. 410.

We therefore insist that the Court has jurisdiction and the motion to dismiss ought not to prevail.

The Motion to Affirm.

If the Court has jurisdiction, no reason is shown for proceeding with it in any other than the usual manner.

The question is a grave one, and the interests involved are most important.

It cannot be seriously claimed that it is *frivolous* to insist, that a special Act of the legislature that gives a railroad company power to sit as a judge between itself and the taxpayers and landowners of a municipality in a matter of several million dollars, and to determine what proportion of that amount such taxpayers should pay, is unconstitutional, or that such an Act of the legislature and proceedings claimed and alleged to be under and by virtue of it, which take private property for purposes prohibited and declared not to be public by the constitution of the State where the property is seized, are unconstitutional as not being due process of law.

Some remarks may be found in the brief filed by the railroad company as to the seriousness of the danger resulting from the existence of these grade crossings, and the delay that has attended their removal, and the importance of a speedy determination of this action, insinuating that Wheeler & Howes have been responsible for the postponement of an important public improvement.

At the same time it stands admitted that under the general law of the State of Connecticut it has been the duty and completely within the power of the railroad company for a period of many years, to remove all the grade crossings at its own expense, and to render them safe by proper guards and precautions even while they existed.

It also cannot be truthfully denied that every grade crossing in Bridgeport might have been eliminated by the railroad company without the condemnation of a foot of additional

land. Those conditions, however, were not satisfactory to the railroad company.

It desired, in addition to the removal of grade crossings, to enlarge and improve its plant in other respects and to make the taxpayers of Bridgeport contribute to the payment of the entire expense, purposes which could not be accomplished under the general law, and which were expressly prohibited by the constitution of the State.

It therefore procured the passage of the special Act in question, permitting it under the mask of grade crossing elimination, to take land not needed for that purpose, and to improve its private property, not only for beyond that purpose, but in a manner utterly inconsistent in some respects with that purpose—at the expense of the citizens of Bridgeport. Its efforts to carry out this lawless and avaricious design have been the primary and continuous cause of the several actions alluded to by our learned opponent in his brief. By one device and another in all this litigation before the present suit, the railroad company has successfully dodged the main issue, and now appears before this Court in the same attitude. In the first action alluded to, (Mooney vs. Clark, 69 Conn. 241) brought by a taxpayer of Bridgeport to enjoin proceedings under the Act, the argument was, that the suit was prematurely instituted, and that the city ought to have been made a party, and the plans and specifications showing the details of the work were not before the Court, and while some remarks are found in the opinion of the Court to the general effect that the Act was constitutional, yet it was evident from the separate opinion of two of the judges that the constitutional question was not necessarily involved.

The next step was an application to the railroad commissioners by the railroad company for their sanction of the proposed scheme. The railroad commissioners having approved it as proper in their opinion, Wheeler & Howes, the plaintiffs

in error here, then respondents, took an appeal to the Superior Court.

The railroad company, by oral representations to the Superior Court that it was proceeding under the special Act, and under the Act no appeal was allowed, obtained a judgment of the Superior Court erasing the appeal from the docket.

Upon appeal to the Supreme Court of Errors, taken by Wheeler & Howes, that judgment was reversed, the Supreme Court holding that no want of jurisdiction appeared upon the face of the appeal.

N. Y., N. H. & H. R. Co. vs. Wheeler & Howes, 70 Conn. 376.

The Railroad Company thereupon moved the Superior Court, in writing, to dismiss the appeal, setting out that the proceeding was instituted solely under the special Act in question.

Upon that ground, the Superior Court again erased the appeal from the docket and the Supreme Court of Errors, upon appeal to that Court from that decision, held it to be correct.

N. Y., N. H. & H. R. Co. vs. Wheeler & Howes, 71 Conn. 270.

Then followed the application for the appointment of appraisers—the present proceeding.

Wheeler & Howes having been so far denied a hearing upon the merits of the question, now interposed the objections which they here insist upon.

Still there is manifested a disposition to evade the issue.

Whereas we were told before that we could not be heard because it was a proceeding under the special Act, now we are informed that the special Act was not in issue at all, at least that its constitutionality or unconstitutionality is of no imaginable consequence, because the proceeding might be regarded as wholly under the general law.

The unsoundness of this latter proposition we trust we have already demonstrated, but the foregoing statement we think may be pardoned in view of the attempt made by our opponent to charge evasive or dilatory tactics upon us.

It has been held by this Court that where a federal question has been raised in a State Court, a motion to affirm will be granted only where the same question has been often determined by this Court adversely to the plaintiff in error so that the rule must be regarded as settled.

Walston vs. Nevins, 128 U. S. 578.

The constitutional questions presented by this writ or error, distinctly raised as we have seen in the State Court, have never been passed upon by this Court, nor, so far as we are aware, by any State Court outside of Connecticut.

Further Argument in Opposition to Motion to Dismiss and Affirm.

At the risk of some repetition, we desire to advance a line of argument in opposition to said motion upon grounds somewhat different from those in the preceding part of the argument.

No question will be raised in this part of the argument as to the constitutionality of the special Act of 1895—that will be assumed to be constitutional.

The inquiry will be whether *the project* of the railroad company, as called for by the agreement and plans, Exhibits A and B, and as approved by the railroad commissioners, is valid and Federally constitutional.

A motion to dismiss will be overruled where a question of Federal constitutionality was directly raised by the plaintiff in error in the State Court and was decidedly adversely to him.

Foster v. Kansas, 112 U. S., 205.
Chicago B. & Q. R. Co. v. Chicago, 166 U. S., 226, 230.

And as to the motion to affirm, it is held that, where a Federal question has been raised in the State court, a motion to affirm will be sustained if the same question has been often determined by this Court adversely to the plaintiff in error; but not otherwise.

Walston v. Nevin, 128 U. S., 578.

An inspection of the record shows that in this case the question of Federal constitutionality was directly raised and was decided adversely to the plaintiffs in error. This appears from the foregoing statement of the case. And on a little investigation it will also appear that the matter is important and of first impression.

The constitutional questions presented by this writ of error have never been passed upon by this Court; nor, so far as we are aware, by any State court outside of Connecticut.

In N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556, it was held that proceedings for the elimination of a grade crossing which resulted in the imposition of the entire expense upon the railroad company and of no part of the expense upon the municipality were valid.

No case in this court has ever affirmed the constitutionality, in process of result, of proceedings, which involve the imposition of even a portion of the expense of such grade crossing elimination upon the municipality.

Still less has any case in this Court, or elsewhere, ever affirmed the constitutionality of proceedings which, under the guise of providing for the elimination of grade crossings, really impose on a municipality a portion of the expense of such grade crossing elimination and also carry with such imposition an involuntary donation to the railroad company of moneys to reimburse such company for outlays not germane to grade crossing elimination, but of advantage to it in the profitable operation of its railroad.

The nature of the present case is of the character indicated in the last paragraph.

In substantiation of our affirmation to this effect we are lead into a discussion of the merits of the case.

Preliminary Claim of the Railroad Company.

As a preliminary claim, the defendant in error contends that, as the proceedings, brought up for review by this writ of error, were simply proceedings for the appointments of appraisers to estimate the damages that would accrue to the plaintiffs in error from the taking of their property by a railroad company in the exercise of the right of eminent domain; the question of whether or not the railroad company's proposed action was in violation of the Fourteenth Amendment to the Federal Constitution was not before the Connecticut Supreme Court of Errors for its consideration, nor is it now before this Court.

On the contrary we maintain: First, that by our established State practice in condemnation proceedings such a question was properly before our State court for its determination, and that the question is now before this Court; and Second, that, notwithstanding any State practice to the contrary, the Fourteenth Amendment imperatively requires condemnation proceedings to have sufficient scope to permit of such a determination.

These two points will be considered in their order.

In condemnation proceedings, under Connecticut practice, *the defendant land-owner by way of defense can question the rightfulness of the purpose for which the plaintiff intends to use the land sought to be condemned;* and if it appears that the purpose is not such as is authorized by law, the petition will be dismissed.

For many years there have been statutory provisions, now found in Conn. Gen. Sec. 1871, whereby public cemetery associations, on failure to agree with adjacent land owners, may maintain condemnation proceedings to secure land necessary for the enlargement of their territorial limits. And it has been the uniform practice in such proceedings for the court to hear and determine every conceivable question that the defendant land owner may desire to raise as to right of the plaintiff to take his land.

Thus in Edwards v. Stonington Cemetery Association, 20 Conn. 466, the defendant raised and the court considered the question of whether or not the Association was a legally organized cemetery association as contemplated by the statute, and also whether or not the land proposed to be taken would be devoted to a public use.

Both questions were answered in the affirmative. As the land owner's objections were not made to the report of the committee finding the necessity and propriety of the proposed enlargement, but were made to the application itself; the determination was one of pure law as to the association's right to take the property.

So in Evergreen Cemetery Association vs. Beecher, 53 Conn. 551, upon an application for the purpose of taking land for cemetery enlargement, on demurrer to the application, it was held that, as it did not appear that the plaintiff desired the additional land for a cemetery in which the public had or could acquire the right of burial, there was nothing to show that the land desired was to be taken for a public use and therefore the demurrer was sustained.

And in Westfield Cemetery Association vs. Danielson, 62 Conn., 319, the right of the plaintiffs to take the land was passed upon.

Petitions for the condemnation of land to be used for flowage purposes, under Gen. Stat., Sec. 1216, have been prolific

in inquiries as to the publicity of the purpose to which the land was to be devoted; the practice has been constant that such questions can be raised in the very condemnation proceedings.

In Williams vs. Elting Woolen Company, 33 Conn. 353, it was even held that an injunction would not lie to restrain a plaintiff in a flowage position from maintaining his action under circumstances where it was alleged that no right of condemnation existed, for the reason that these facts could be shown in defense to the petition.

The question as to whether or not the mill for the benefit of which the land was to be used, was operated for the benefit of the public, so that the land was to be devoted to a "public use," was expressly passed upon in the following cases in the condemnation proceedings themselves.

Olinstead v. Camp, 33 Conn. 532.
Todd v. Austin, 34 Conn. 78.
Occum Co. v. Sprague Mfg. Co., 35 Conn. 496.
McArthur v. Morgan, 49 Conn. 347.
Geer v. Rockwell, 65 Conn. 316.

And in reference to this very question, of whether or not the right of the railroad company to take the land sought to be condemned may be in issue, it has been determined that the inquiry may be made and answered in the condemnation proceedings.

In New York etc. R. R. Co. v. Long, 69 Conn. 424. which was an application for the appointment of appraisers, various defenses were made and evidence was offered tending to show that the applicant railroad company had no right to take the land of the defendant.

At p. 434, the court say:

"The defendant's appeal contains a long list of assignments of error. They can, however, all be considered under the two propositions above indicated: Did the facts show that the

applicant, being a railroad company, had the right to take the real estate described for railroad purposes; and was it unable to obtain the same by agreement with the parties interested therein? And, perhaps, the third question: were any errors committed in the course of the hearing?"

It was accordingly held that there was error in that a question was excluded which tended to show that the land was desired to be used, not for railroad purposes, but for steamboat purposes.

We have therefore established the proposition that the courts of Connecticut have hitherto ruled that the law is such that a defendant in condemnation proceedings can, in the proceedings themselves, raise every question as to the right of the plaintiff to take the specific land—including the question as to whether or not the land is intended to be devoted to a public use.

And the principle that we contend for has again been enunciated in the case of the Hartford and Connecticut Western Railroad Company v. Montague, decided by the Connecticut Supreme Court of Errors, on April 4, 1900, and not yet reported.

What shall be said, then, of the language, used by the Connecticut Court in deciding the case at bar, that, as the Railroad Company claims, enunciates a different doctrine? We refer to the part of the opinion from the middle of page 40 of the transcript to the middle of page 41. Conceding this to be so will not help this motion to a successful result.

This Court has frequently held that where there have been a series of decisions by a State court apparently establishing a certain principle or practice as to local law, but where, in a case involving, as one party claims, a question of Federal Constitutional law, the highest tribunal of the State has enunciated a doctrine departing from the doctrine previously established in such a way as to avoid a decision of such Federal Constitu-

tional question, or in such a way as to enable it to decide that nothing has been done in violation of the Federal Constitution; this Court will disregard such later oscillation and will go back to the old decisions as being truly enunciatory of the local law.

Gelpecke v. Dubuque, 1 Wall. 175.

But a careful examination of the opinion of the Court will show that the real ground of decision is that, as they regard the matter, there is no basis to our claim that the taking of the property of Wheeler & Howes will be without due process of law. See transcript from middle of page 40 to middle of page 41. This part of the decision will be considered in the discussion of the case on the merits, where its consideration properly belongs.

And there is another consideration that is conclusive. Our second point in opposition to the preliminary claim of the Railroad Company was, that irrespective of any State practice to the contrary, the Fourteenth Amendment requires condemnation proceedings to have sufficient scope to permit of the determination, at some time in their progress, of the question of whether or not the defendants' property is being taken in accordance with due process of law.

This must necessarily be so for the reason, first, that unless there is opportunity to adjudicate upon the due process question in the course of the condemnation proceedings themselves, there can be no such adjudication at all prior to the taking of the property; and, second, to deny an opportunity to a party to be heard would of itself be a denial of due process of law.

First, we will show that by Connecticut practice the hearing on an application or petition for the appointment of appraisers is the only "process" of any nature anterior to the dispossession of the land owner.

"In its application to the condemnation of land for railway use, the word 'taken' in the Constitution means the exclusion of the owner from use and possession and the actual assump-

tion of exclusive possession by the railroad corporation at the termination and as the result of judicial proceedings."

Woodruff v. Catlin, 54 Conn., 277, 297.
New York etc. R. R. Co. v. Long, 69 Conn. 424, 425.
Nolan v. New Britain, 69 Conn., 668, 681 and 682.

It consequently follows that the orders of the railroad commissioners approving the plans for grade crossing elimination, even though such plans contemplated a taking of property belonging to the plaintiffs in error, did not constitute the "taking" of such property.

Dickerman v. N. Y, etc. R. R. Co., 72 Conn., 271.
Wheeler vs. New York, etc. R. R. Co., 71 Conn. 270.

Yet, on the other hand, the "taking" must be consummated with the termination of condemnation proceedings and the payment or tender of payment of the duly ascertained compensation to the land owner; for upon the happening of these precedent events, the railroad company becomes entitled to the use and enjoyment of the property by means of an execution.

Conn. Public Acts of 1899, Chap. 3.

Section 1 of this Act reads, "When, under the provisions of any statute authorizing the condemnation of land in the exercise of the right of eminent domain, an appraisal of damages shall have been returned to the clerk of the Superior Court, as provided by law, and when the amount of appraisal shall have been paid or secured to be paid or deposited with the treasurer of the county, as provided by law, any judge of the Superior Court may, upon application and proof of said payment or deposit, order said clerk of the Superior Court to issue an execution commanding the sheriff of the county to put the parties entitled thereto into peaceable possession of the land so condemned."

Consequently the process by means of which the property is taken, and the process which the Constitution requires shall be "due process," must be the condemnation proceedings themselves; that is the petition for the appointment of appraisers the action of the court upon the petition and in appointing appraisers, and the action of the appraisers pursuant to their appointment. The process resulting in in the taking of property, not being, as above shown, anterior nor subsequent to the condemnation proceedings, is narrowed down to and is co-extensive with these very proceedings.

But, second, the condemnation proceedings, to the limits of which any such hearing is confined, cannot be conducted in a manner consonant with "due process" if the property owner is denied the opportunity to make a contest as to the public character of the use for which the railway corporation proposes to devote the property.

Where a plaintiff sues to obtain a judgment, the defendant has a constitutional right to defend, so as to put in issue all matters of law and fact necessary to sustain such judgment; the constitutional right of defense is co-extensive with the attack. Every defendant must have a day in court long enough to permit him to be heard as to every matter that affects him.

"Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable." Anything less than this is not "due process of law."

Windsor v. McVeigh, 93 U. S. 277.
Hovey v. Elliott, 167 U. S. 409.

Condemnation proceedings are like any other action in this respect.

Searl v. School District No. 2, 124 U. S. 197.
Boom Company v. Patterson, 98 U. S. 277.
Pacific Railroad Revoval Cases, 115 U. S. 1.
N. Y., N. H. & H. R. R. Co. v. Long et al., 69 Conn. 437.

And it has been expressly adjudicated by this Court in accordance with our claim.

A pecularity of the Illinois procedure on condemnation proceedings has been that the land owner is not permitted therein to defend or to be heard in anything except as to the amount of damages he should receive.

Smith v. C. & W. I. R. R. Co., 105 Ill. 511.

Yet this Court has decided that such a defendant has an inherent right in some way to make a defense involving a question of Federal Constitutional law.

"It is not, therefore, important that the defendant neither filed nor offered to file an answer especially setting up or claiming a right under the Constitution of the United States. It is sufficient, if it appears from the record that such right was specially set up or claimed in the state court in such manner as to bring it to the attention of that court. . . . . The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding so far as it related to the railroad company, and the legal effect of the judgment of the Supreme Court of the State was to deny them. 'The true and rational rule, this Court said in Proprietors of Bridges v. Hoboken Land and Improv. Co. 68 U. S. 1 Wall. 116, 143, 'is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In Roby v. Colehour, 146 U. S. 153, 159, it was said that 'our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' DeSaussure v. Gaillard, 127 U. S., 216, 234; Brown v. Atwell, 92 U. S., 317; Chicago L. Ins. Co. v. Needles, 113 U. S., 574, 577; Sayward v. Denny, 158 U. S., 180, 183. There, is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted

by the defendant under the national Constitution was not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits."

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S., 226, 231 and 232.

The conclusion is irresistible that the question of whether or not the property of the plaintiffs in error is being taken in accordance with due process of law, was passed upon by the Connecticut Court in such a way as to be reviewable by this Court.

The Federal Constitutional Question.

Having met, as we believe, this preliminary objection, there is presented for consideration the main question in this case: *Is the property of the plaintiffs in error being taken in accordance with due process of law?*

It is a fundamental proposition of constitutional law that private property can be taken under the right of eminent domain only for public uses; and any attempt to take private property for a non-public use would be a violation of the Fourteenth Amendment.

The question whether private property has been taken for any other than a public use is a Federal question, notwithstanding the absence of any prohibition in the Federal Constitution which is applicable to the state authority against taking property for any but a public use, when the taking for any other use is alleged to be a deprivation of property without due process of law.

Fall Brook Irrg. Dist. v. Bradley, 164 U. S. 112.

"The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

Missouri Pacific R'y Co. v. Nebraska, 164 U. S. 403, 417.

In that case the prohibited taking consisted in the attempt on the part of the Nebraska State Board of Transportation to compel a railroad company to surrender a part of its land to private persons for the purpose of building and maintaining upon it a grain elevator for their accommodation in storing merchandise for delivery to the railroad.

Whether the purpose for which the private property is sought to be taken is a non-public purpose is a constitutional question which this Court can review irrespective of the adverse determination of the State court.

See authorities cited at p. 417 in support of the proposition last cited.

When is the Taking of Property for a "Public Use"?

It is conceded by Wheeler & Howes that this track is wanted for a four-track railroad along a line of reduced curvature for the construction of which the city of Bridgeport, by its legislatively appointed agents, has agreed to contribute, and that this work, including the contribution by the city, has been approved by the railroad commissioners. No appeal lay from this approval of the railroad commissioners.

Wheeler v. N. Y., etc. R. R. Co., 71 Conn. 270.

But from the concession that the land is to be "*in fact* taken for public use," i. e., a four-track railroad (transcript, p. 39), the Connecticut Court proceeds to argue that, whether or not the city can be compelled to reimburse the railroad company for a portion of its outlay, is immaterial to the question. See transcript, middle of p. 39 to end.

This is an utter begging of the question.

The reasoning is that the taking of this property is only "one step in carrying out the proposed plan" of the railroad company and that as it has the general right to condemn land for

railroad purposes it might have condemned this land, without having made an agreement whereby part of an unconstitutional charge will be imposed on the city of Bridgeport.

"It is a condition that confronts us and not a theory." The question is not what the railroad company might have constitutionally done, but whether what it has actually done is constitutional.

Our claim is that in determining whether this land is to be taken for a public use, regard is not to be had merely to the immediate purpose of the railroad company, but also to the legality and constitutionality of its entire plan, and, if its entire plan is tainted with illegality on unconsti utionality, there can be no such publicity of purpose as will justify the exercise of the high prerogative of eminent domain.

Obsta principiis is a sound maxim where constitutional rights are in danger of being encroached upon.

Mooney v. Clark, 69 Conn. 244.

Upon the merits of the case it is encumbent on Wheeler & Howes to establish two propositions:

First, that the reinbursement of the city of Bridgeport to the railroad company of a portion of the expense to be incurred by it in carrying out its project will be in whole or in an inseparable part an expenditure of money by the city for a non-public use.

Second, that the non-public character of this proposed expenditure by the city so vitiates the project of the railroad company that it cannot invoke the power of eminent domain as a means of acquiring the property of Wheeler & Howes.

These propositions will be considered in their order.

The criterion of what constitutes a public use is difficult of determination. Broad considerations of public policy, affecting the interests of the state and society in their interests as a whole, are chiefly decisive.

"Public use may therefore well mean public usefulness, utility, or advantage, or what is productive of general benefit; so that any appropriating of public property by the State under its right of eminent domain for purposes of great advantage to the community is a taking for public use."

Olmstead vs. Camp, 33 Conn., 532, 546.
Fallbrook Irrigation District vs. Bradley, 164 U. S. 112.

It is safe to affirm, however, that no purpose, manifested on the part of a private corporation seeking to exercise the right of eminent domain under power delegated to it by the legislature, will be for the public good if it appears that the exercise of the power will be in furtherance of a scheme contrary to law, especially if such law is the fundamental law of the State. No such unrighteous end will justify as a means the invocation of the high prerogative of eminent domain. That cannot be a public use resulting in "public usefulness, utility or advantage, or what is productive of general benefit," where private property will be taken to aid in carrying out a project violative of a provision in the State constitution.

Within its proper limits, no power exercisable by the State, is more invincible than that whereby private property is taken for public use. Outside of its proper limitations, no power is or should be so weak. Next to life and liberty, the rights of property demand the highest judicial protection. How zealous, therefore, should be its courts to examine to the uttermost every invocation to them which will deprive a citizen of his property against his will and transfer it to some corporate creature of the legislature? It is a familiar maxim that he who comes into equity must come with clean hands. Much more must this be required of those who banded together in corporate form come into court demanding that their fellow citizen shall surrender to them his property. There must be a purity, like Cæsar's wife, above suspicion.

"The rule of strict construction of condemnation statutes is especially applicable to delegations of the power by the legis-

lature to private corporations. The motive of the promoters of such corporations is usually private gain, although their creation may subserve a public service. When such corporations claim to exercise this delegated power, the rule of strict construction accords with the ordinary rule that delegations of public powers to individuals or private corporations are to be strictly construed in behalf of the public, and by the other principle that private rights are not to be divested except by the clear warrant of law."

Matter of Poughkeepsie Bridge Company, 108 N. Y., 491.

In Loan Association vs. Topeka, 20 Wall, 655, Mr. Justice Miller says:

"The subject of aid voted to railroads by counties and towns has been brougnt to the attention of the Courts of almost every State in the Union. It has been frequently discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations to build railroads and to lend their credit to such corporations. Also to levy the necessary taxes upon the inhabitants, and on property within their limits subject to general taxation, to enable them thus to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether. State vs. Wapello Co., 13 Iowa, 388. Hanson vs. Vernon, [27 Iowa, 28]; Sharpless vs. Mayer, [21 Pa. St. 147, 167]; Whitney vs. Fond du Lac, [25 Wis. 188].

"In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public purpose, *a purpose or object which it was the right and duty of state governments to assist by money raised from the people by taxation.* The argument in opposition to this

power has been, that railroads built by corporations organized mainly for the purpose of gain—the roads which they built being under their control, and not that of the State—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way * * *

"We have referred to this history of the contest over aid to railroads by taxation to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was issued could no longer justly be claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power and was an unauthorized invasion of private right. Olcott vs. Supervisors, 16 Wall, 689; People vs. Salem, 20 Mich. 452; Jenkins vs. Andover, 103 Mass. 194; Dill. Mun. Cor. sec. 587; 2 Redf. R. R., 398, rule 2." * * *

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose."
Loan Association vs. Topeka, 20 Wall. 655.

The most thoughtful and eminent jurists have condemned as unsound in principle and disastrous in consequence the doctrine that municipal aid may constitutionally be given to railroad corporations.

1 Dillon on Municipal Corporations, (4th ed.), §§ 153 et seq. and 508.

Cooley on Constitutional Limitations, (6th ed.), pp. 263–269.

In Connecticut, however, up to 1877, such municipal aid was held to be constitutional.

Bridgeport vs. Housatonic R. Co. 15 Conn. 475.

Society for Savings vs. New London, 29 Conn. 174.

Douglass vs. Chatham, 41 Conn. 211.

The reckless incurring of indebtedness for railroad projects in various forms by municipalities under legislative license had become such a crying evil that in 1877 the people effectually

prohibited the practice by the adoption of the Twenty-fifth Amendment to the Constitution of Connecticut. The part here applicable is as follows:

"No county, city, town, borough, or municipality, shall ever subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of any such corporation."

So far as any judicial intimation by the Connecticut Court exists in relation to the meaning of this amendment, it is in favor of the contention of Wheeler & Howes.

Mooney vs. Clark, 69 Conn. 241, at p. 257.

As to that case it may be well right here to observe that the only question there decided was that the Special Act of 1895 for the elimination of grade crossings in Bridgeport and the agreement entered thereunder are, on their face, *i. e., apart from the particular features disclosed by the plans, Exhibit B,* constitutional and valid. For the conclusion of the decision is "The Special Act is constitutional."

69 Conn. at p. 249.

The special Act is quoted at p. 249.

Such was the only question presented in that case. But, even so, two judges deemed it their duty to utter a warning against the decision being taken too broadly, and carefully pointed out that if it should be made to appear that the arrangement in question really called for the city to contribute towards an expense not germane to the work of eliminating grade crossings, it would be in contravention of the XXVth Amendment of the State Constitution.

Previous to the XXVth Amendment, adopted in 1877, as before observed, money donated by a municipality in aid of railroad corporations was deemed to be intended for a public use.

The obvious purpose and effect of this Amendment was to make such a use no longer a public use. This has been the construction put upon such constitutional provisions in other states.

And the question as to the proper interpretation of this Amendment is open for the determination of this Court.

Pleasant Township v. Aetna Life Ins. Co., 138 U. S. 67.
Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 155.

In reference to similar language in the Constitution of Colorado, it has been stated:

"It was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit, by the fundamental law of the new State, all public aid to railroad companies, whether by donation, grant or subscription."

Colorado C. R. Co. vs. Lea, 5 Colo., 192.

See also,

Baltimore, etc., R. Co. vs. Humphrey, 74 Md., 86.
People vs. State Treasurer, 23 Mich., 499.
Thomas vs. Port Huron, 27 Mich., 320.
Webb vs. Lafayette County, 67 Mo., 353.
Allen vs. Louisana, 103 U. S., 80.

A reference to the authorities, e. g. 1 Dillon on Municipal Corporations, (4th ed.) §§ 153 et seq. and 508, and Cooley on Constitutional Limitations, (6th ed.) pp. 263-269, will show that the doctrine of the validity of municipal aid to railroad corporations was an unfortunate judicial exception to the principle that public funds cannot be used in aid of private enterprises. *The purposes of the constitutional prohibition was to eliminate this exception and to restore the principle to a condition of integrity that should never have been impaired.*

Citations will be useful as showing the scrupulous rigor with which the general principle has been applied.

Thus a law purporting to authorize municipalities to raise money by taxation to pay a certain sum to any drafted man, who served in the Civil War, or his heirs, is violate of the constitutional provision forbidding any municipality to give money or property or to incur any indebtedness in aid of any individual.

Bush vs. Board of Supervisors, 159 N. Y. 212.

"A town cannot raise money by taxation to pay the expenses of a committee directed by a vote of the town to procure from the Legislature the passage of an act, which act, when passed, is unconstitutional."

Mead vs. Acton, 139 Mass. 341.

An act authorizing a city council, for the purpose of widening streets, to cause "lots" to be assessed, and to take them at the assessed value, only relates to such portions of land as shall be actually necessary for the street. If so construed as to give the power of taking more, the act would be unconstitutional.

Dunn vs. Charleston, 1 So. Car. 189.
In re Albany Street, 11 Wend. 149.

The following quotations are verbatim from Hare's American Constitutional Law, the authorities being placed under the appropriate sentence rather than at the foot of the pages.

"Taxation has been defined as the substraction of a small portion of the constantly accumulating mass of private property for the purpose of the government by which the tax is imposed, and is distinguished from confiscation by the end in view, which is to provide for the defence, security, and welfare of the community, including the persons who pay the tax. Agreeably to the Fifth Amendment and the organic laws of the various States, 'Private property shall not be taken for public use without just compensation.' Taxation is such a taking, and would be at variance with these guaranties, but for the presumption that the citizen is benefited through the appropriation of the money raised by the tax in some just proportion to the sum which he is compelled to pay."

Hammett vs. Philadelphia, 65 Pa. St. 146, 152; Kelly vs. The City of Pittsburgh, 85 Pa. St. 170, 184; Lexington vs. McQuillan, 9 Dana,

513; Tidewater Co. vs. Coster, 3 C. E. Green, 518; The People vs. The Mayor of Brooklyn, 4 Comstock, 419, 424; Livingstone vs. Paducah, 80 Ky. 656.

"It follows that when the proceeds are by the terms of the act to be appropriated to a private purpose,—as where an act of assembly required insurance, trust, and annuity companies to pay two per cent of their gross earnings to an association for the relief of disabled firemen—the presumption is rebutted, and the tax is illegal."

"Such a measure may be termed 'taxation,' but is in effect taking the property of one man to bestow it on another, and contrary to the fundamental rule that no one shall be deprived of life, liberty, or property, save by the judgment of his peers or the law of the land."

Philadelphia Association vs. Wood 39 Pa. 73; Weber vs. Reinhard, 73 Pa. 370, 373; Butler vs. Supervisors, 26 Mich. 29.

"Had the tax been for the support of a fire department, it would have been valid, as tending to an end in which the insurance companies and the community were alike interested; but charity to disabled firemen is no more a public use than if it were bestowed on sufferers of any other class."

Parkersburg vs. Brown, 106 U. S. 487, 501.

"To warrant taxation, the purpose must consequently not only be beneficial, but concern the public. A merely private benefit is not enough, although conferred upon the parties who oppose the tax and affording an ample compensation; because under a free government, when no public considerations are involved, every man should be allowed to choose for himself. An act authorizing commissioners to construct the dikes, floodgates, ditches, and other works requisite for draining a marsh or bog at the expense of the owners, without inquiring whether the undertaking is demanded by, or conductive to, the welfare or health of the community, is therefore not less unconstitutional, if viewed merely as a tax, because the benefit will more than repay the debt."

Scott vs. Philadelphia, 81 Pa. 80; Butler vs. The Supervisors, 26 Mich. 29. See Wurtz vs. Hoagland, 114 U. S. 606; *post*, p. 289.

"So the legislature cannot authorize a municipal corporation to issue bonds for the purpose of lending them to persons en-

gaged in manufacturing within its limits, because such a grant implies the right and duty to tax as a means of payment; and the bonds will consequently be invalid if the defect is apparent, even in the hands of a purchaser for value."

Loan Association vs. Topeka, 20 Wallace 655; Parkersburg vs. Brown, 106 U. S. 487, 501; Cole vs. La Grange, 113, U. S. 46.

"A tax, as defined in Webster's Dictionary and by the Supreme Court of the United States, is 'a burden imposed by the legislature on persons or property for public purposes,' and no fact which manifestly contravenes this principle can be valid.

Loan Association vs. Topeka, 20 Wallace, 655; Butler vs. The Supervisors, 26 Mich. 29.

"The power is nevertheless plenary as to objects within its scope, and one as to which the decision of the legislature is conclusive, unless the line is passed at which the abuse of authority becomes a usurpation or excess."

Loan Association vs. Topeka, 26 Wallace, 655; Sigler vs. Fuller, 5 Vroom (N. J.) 227; Agurs vs. The Mayor, 6 Vroom (N. J.) 172; Sharpless vs. Mayor of Philadelphia, 21 Pa. St. 147.

* * * * * * *

"If the end be not public, it matters not that the individuals for whose benefit the tax is laid are numerous, nor that the object is to afford relief from the consequences of a pestilence, fire, inundation, or other general and widespread calamity. Soon after a disastrous fire, which laid a large part of the business quarter of Boston in ashes, the Governor of Massachusetts convened the legislature to devise measures in aid of the city and its inhabitants; and a law was passed authorizing the city councils to issue bonds to the amount of twenty millions of dollars, and loan them to the persons whose buildings had been consumed, to assist them in rebuilding. The law was held to be unconstitutional, as empowering the city to contract an obligation which would necessitate taxation for a purpose which was not less private because there were a great number of recipients, and the money was to be expended in a way that would be indirectly advantageous to the community which paid the tax."

Lowell vs. Boston, 111 Mass. 454; Loan Association vs. Topeka, 20 Wallace, 655.

"It was decided on like grounds in Weisner vs. The Village of Douglass," 64 N. Y. 91, "that the legislature could not empower a municipal corporation to issue bonds for the amount of its subscription to a company which had been incorporated by the state with authority to erect a dam across the Delaware and use the water power so obtained for manufacturing lumber and other raw materials. The use was private, although it tended to promote the growth and prosperity of the town, and might therefore in common parlance be termed public. So a municipal corporation cannot be authorized to tax the citizens for the support of a school, hospital or library, although its doors are open to the public, and a great number of persons will participate in the advantages which it confers, unless it is a public agency, or controlled and managed by the State."

Jenkins vs. Andover, 103 Mass. 94; Curtis' Adm'r. vs. Whipple, 24 Wis. 350; Whiting vs. Sheboyan and Fond du Lac R. R. Co., 25 Id. 188.

"The power would seemingly be limited, though there were no express prohibition. It is inherent in the idea of taxation that it should be for the public good, and a law taxing one set of men for the benefit of another, or in furtherance of an industrial enterprise in which they were engaged would be regarded as confiscation in all civilized countries. As was well observed in The Loan Association vs. Topeka, 20 Wallace, 635, 'to lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprizes and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. Such an enactment is not legislation: it is a decree under legislative forms.'"

1 Hare's American Constitutional Law, pp. 277–281.

Therefore the bestowal of money upon a railroad corporation can no longer, under the XXVth Amendment of the Connecticut Constitution, be for "a public use."

Pleasant Township vs. Aetna Life Insurance Co., 138 U. S. 67.

"A constitutional provision prohibiting a municipal corporation from aiding a railroad by subscriptions or donations would, it is hardly necessary to say, place it beyond the power of the legislature to empower municipal corporations to grant such aid."

2 Elliott on Railroads, § 820.

Norton vs. Board of Commissioners, 129 U. S. 479.

Wadsworth vs. Supervisors, 102 U. S. 534.

Buffalo etc. R. Co. vs. Falconer, 103 U. S. 821.

Kelley vs. Town of Milan, 127 U. S., 139, 154.

Mayor etc. vs. Gilmore, 21 Fed. Rep. 870.

Taxpayers etc. vs. Tennesse R. Co., 11 Lea, 329.

List vs. Wheeling, 7 W. Va. 501.

And the project of the railroad company would also result in the taking of the property of the taxpayers of Bridgeport without "due process of law," guaranteed by Section 1 of Article XIV of the Amendments to the Federal Constitution.

City of Bay City, vs. State Treasurer, 23 Mich. 499.

In re Opinion of the Justices, 58 Maine, 590.

It does not affect this conclusion that municipalities may voluntarily or involuntarily contribute towards the expense of removing grade crossings. That is still constitutionally legitimate. This is so because grade crossings are a nuisance for the existence of which the municipality and railroad company are equally responsible.

Woodruff vs. Catlin, 54 Conn., 277.

Town of Westbrook's Appeal from R. R. Commissioners, 57 Conn., 95.

N. Y. & N. E. R. R. Co.'s Appeal from R. R. Commissioners, 58 Conn. 532.

Woodruff vs. N. Y. & N. E. R. R. Co., 59 Conn. 63.

State's Attorney vs. Selectmen of Branford, 59 Conn. 402.

N. Y. & N. E. R. R. Co's Appeal from R. R. Commissioners, 62 Conn. 527.

State ex rel. N. Y. & N. E. R. R. Co. vs. Asylum Street Bridge Com., 63 Conn. 91.

In N. Y. & N. E. R. R. Co.'s Appeal, 57 Conn., at p. 240, the Court says:

"Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal; or that either may be required to pay the whole; and if each contributes, that the proportion which each shall pay may be determined by the legislature in each case as it arises, or by a general rule; by itself, or by a delegation of its powers to the Railroad Commissioners."

And in 62 Conn., at p. 540, the Court says:

"It being established by the legislature and by the repeated decisions of this Court that grade crossings are in the nature of nuisances and dangerous to life, the right of the legislature to cause them to be abated, and to require either party to pay the whole or any portion of the expense cannot be questioned."

Therefore any imposition upon the city of Bridgeport to pay part or all of the expense of grade crossing elimination would not be contrary to the Connecticut State Constitution.

But, as the part of the imposed expense that will go towards paying for work not germane to grade crossing elimination is not severable from that part of the expense that will go towards paying for such grade crossing elimination, the whole project is inextricably and irretrievably tainted and void.

"The scheme of the whole is indivisible. It cannot be separated into parts. It must stand or fall together."

Poindexter vs. Greenhow, 114 U. S. 269, 304.
Pollock vs. Farmers' Loan & Trust Co., 158 U. S. 429 and 601.
Norwood vs. Baker, 172 U. S. 269.
Guthrie on the Fourteenth Amendment, pp. 50 and 51.

We therefore have, as we believe, established the first proposition above put forward, to wit, that neither the city of Bridgeport nor its taxpayers, under the XXVth Amendment of the State Constitution and the XIVth Amendment of the Federal Constitution, can be compelled or permitted to reimburse the Railroad Company for any part of the expense of this project.

Our second proposition is that if the project is thus unconstitutional and void, the property of Wheeler & Howes cannot be condemned in furtherance of a project so non-public, unconstitutional and void.

The Railroad Company's own avowed purpose in taking the land of Wheeler & Howes is this:

"In order properly to carry out in any and all particulars, as called for in said plans, the work imposed upon said railroad company by special act and agreement and said order and finding of said railroad commissioners, said company deemed it necessary to take all those certain pieces or parcels of land as shown on said plans [including the property of Wheeler & Howes]. Transcript, p. 9, par. 5.

This purpose was found to be truly stated by the trial judge. Transcript, p. 22.

No authorities are necessary to establish the proposition that a railroad company in exercising the power of eminent domain, is exercising a prerogative of the State delegated to it by the State for the convenient accomplishment of some public end that the State might itself have undertaken. But the State of Connecticut, as well as the city of Bridgeport, is debarred from violating the State Constitution.

2 Elliott on Railroads, § 820 and cases *supra*.

Now, if in any given instance the State is constitutionally debarred from accomplishing any given end, any delegatee of the State is equally debarred.

We regard this as an exceedingly important proposition.

Again we quote from Hare's Constitutional Law:

"The principle that taxes shall not be laid save for a public end, applies with equal force to the right of eminent domain, which does not warrant the appropriation of land without the owner's consent where no public interest is involved, or, more accurately, unless the property is taken for some public duty which it is incumbent on the government to fulfil; and if this

essential element is wanting, it matters not that the object for which the power is exercised is beneficial to the owner, and will compensate the loss."

Taylor vs. Porter, 4 Hill, 149, 148; In the matter of Albany St., 11 Wend., 149; Helm vs. Webster, 75 Ill., 116; Pittsburg vs. Scott, 1 Pa., St. 309, 314; Palairet's Appeal, 67 Id., 479; Eldridge vs. Smith, 34 Vt., 484; Beekman vs. The Schenectady R. R., 3 Paige, 45; The West River Bridge Co. vs. Dix, 6 Howard, 507; Butler vs. The Supervisors, 26 Mich., 29.

"What the government may do in this regard directly, it may moreover do through an agency established for that end; and the right of eminent domain may consequently be delegated to an incorporated company, or to one or more individuals, for the construction of a railway or other work of a like kind, subject to the duty of keeping it open for public use when finished."

1 Hare's American Constitutional Law, pp. 336 and 337.

"There is nevertheless a preliminary inquiry: Is the use so far public that property can be taken consistently with the constitutional guaranties? These would be of little worth if the citizen could be deprived of his lands or goods by labelling that public which is essentially private; and as this question is judicial, it may be considered by the courts, and the decision of the legislature reversed if manifestly unsound."

The Concord R. R. Co. vs. Greeley, 17 N. H., 57; Palairet's Appeal, 67 Pa. St. 480, 488; Rutherford's Case, 72 Pa. St. 82; Neponset Meadow Co. vs. Tileson, 133 Mass., 189.

"It is not less clear that the object must be one which the government is entitled to effect directly under the powers entrusted to it for the common good; and land cannot therefore be constitutionally taken in this country for the erection of a building for public worship, nor, as it would seem, for an opera house or a theatre."

1 Hare's American Constitutional Law, p. 346.
State v. Guilbert (Ohio Sup.) 47 Northeastern Reporter, 551.

The mere fact that this Railroad Company intends to use the property of Wheeler & Howes for the location of a four-

track railroad does not necessarily make the taking to be one for a public use. Courts look further than the immediate purpose. The entire scheme is open to inquiry. Otherwise fraud and injustice might be perpetrated with impunity.

Therefore on condemnation proceedings it has been determined that a railroad company cannot take land for the purpose of building a spur track from its railroad to a private manufactory.

Pittsburg, W. & K. R. Co. v. Benwood Iron Work, 31 W. Va. 710.
Chicago R. Co. v. Wiltz, 116, Ill., 449.

Nor for the purpose of building a railway without termini on any public highway and for the carriage of sightseers as a source of profit.

Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 373.
See Apex Transportation Co. v. Garbade (Oregon) 52 Pacific Reporter, 573.

Nor can condemnation proceedings be maintained for the purpose of acquiring land for a cemetery association in its nature public only so far as inferable from its willingness to sell burial lots to persons, who by such purchase would become members of the association.

Matter of Deansville Cemetery Asso., 66 N. Y. 569.
Evergreen Cemetery Association, 53 Conn 531.

Nor for the purpose of aiding in its acquisition of land a corporation chartered to excavate a basin for the anchorage and mooring of vessels and to build docks and warehouses.

Matter Appl'n of E. B. W. & M. Co., 96 N. Y. 42.

Chief Justice Marshall said:

"*Let the end be legitimate, let it be within the scope of the Constitution*, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but

consistent with the letter and spirit of the Constitution, are constitutional."

McCulloch vs. Maryland, 4 Wheat. 421.

And extrinsic evidence is always admissible to show that the ulterior and the true purpose of the proceeding is not in furtherance of a taking for a validly public use.

"Looking at the articles of association alone, it appears that the company is a railroad corporation organized under the General Railroad Act for 'public use in transporting persons and property' by a railroad to be constructed between certain termini. The papers on their face show that the corporation has undertaken an ordinary railroad enterprise within the purview of the act of 1850, in aid of which the power of eminent domain may be appropriately exercised. But when we look beyond the formal document, and the actual business proposed to be conducted is considered, we find that the proposed railroad has no proper termini; that it is not a highway in any just or proper sense; that it cannot, by reason of necessary limitations, perform one part of the duty it has undertaken, viz.: the transportation of freight; that at most it can be operated but a portion of the year, and that the sole object of its construction is to enable the corporation, for a compensation to be received, to provide for the portion of the public who may visit Niagara Falls, better opportunities for seeing the natural attractions of the locality. We feel constrained to say that in our judgment this is not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise. The right of the company being challenged on this ground, the court is compelled to consider it."

Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 384.

"The acquisition of lands for the purpose of speculation or sale, or to prevent interference by competing lines, or methods of transportation, or in aid of collateral enterprises remotely connected with the running or operating of the road, although they may increase its revenue and business, are not such purposes as authorize the condemnation of private property.

"And when the corporation claims to acquire lands under a delegation of the power of eminent domain, it must show express authority of law to justify the claim.

"The taking of private property for public uses, is in dero-

gation of private rights. It is in hostility to the ordinary control of the citizen over his estate, and statutes authorizing condemnation are not to be extended by inference or implication.

"In this case, among the purposes stated by the respondent for which the land of the defendant is required, are the construction of tenements, and of slips and docks upon the lake.

"The construction of dwellings for employees or officers, and the construction of slips for the accommodation of vessels bringing freight to, or taking it from the railroad company, are not, we think, upon the proofs before us, necessary corporate purposes, within the statute.

Renssalaer and Saratoga R. R. Co. vs. Davis, 43 N. Y. 137, 146.

"The general grant of legislative power in the Constitution of a state does not enable the legislature in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

Cole vs. City of La Grange, 113 U. S. 6 and see cases cited.

"Considering whether the power of eminent domain is sought to be exercised agreeably to the Fourteenth Amendment, 'the primary inquiry always is whether the use is public or not. If the use is not public, private property cannot be taken.'"

Guthrie on the Fourteenth Amendment, 89.
Missouri Pacific Railway vs. Nebraska, 164 U. S. 403, 417.

"There is no specific prohibition in the Federal Constitution which acts upon the states in regard to their taking private property for any but a public use. . . . . It is claimed, however, that the citizen is deprived of his property without due process of law, if it is taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court,

even where the taking is under the authority of the state instead of the Federal government.

* * * * * * *

"The Supreme Court of California has held in a number of cases that the irrigation act is in accordance with the state Constitution, and that it does not deprive the land owners of any property without due process of law; that the use of water for irrigating purposes under the provisions of the act is a public use, and the corporations organized by virtue of the act for purpose of irrigation are public municipal corporations organized for the promotion of the prosperity and welfare of the people. [Quoting California decisions.]

* * * * * * *

"We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law."

Fallbrook Irrigation District vs. Bradley, 163 U. S. 112, at pp. 158 and 159.
Backus vs. Fort Street Union Depot Co., 169 U. S. 557, 565.
Guthrie on the Fourteenth Amendment, 92–94.

The effect of the Twenty-fifth Amendment to the Connecticut Constitution has been to make certain features, as before specified, of the work covered by the agreement and plans, to be non-public. A permission to carry out this project by use of the power of eminent domain would therefore be a violation of the Fourteenth Amendment to the Federal Constitution in depriving Wheeler & Howes of their property without due process of law.

Wheeler & Howes will be prejudicially affected in this regard as owners of the property in question.

They will also be prejudicially affected as taxpayers of the city of Bridgeport and also as such are entitled to relief.

Resort can never be had to equity where avail can be made of common law remedies.

2 Dillon on Municipal Corporations (4th ed.) 907 and cases in the notes.

But a taxpayer is always entitled to redress against any threatened abuse or excess of corporate power.

Id. § 908.

Therefore Wheeler & Howes properly seek redress as taxpayers in this action.

It is admitted that Wheeler & Howes own the land in question. Therefore by force of law they are taxpayers.

Conn. Gen. Stat. Secs. 3802, 3809, 3814, 3827 and 3876 et seq.

Having alleged facts showing that Wheeler and Howes were taxpayers, it was unnecessary to make allegations of law to the effect that they were defending this action in their capacity of tax-payers.

Goodrich v. Stanton, 71 Conn. 424.
Morehouse v. Throckmorton, 72 Conn. 449.

The Absence of Actual Assent by the City.

It is said that the legislature of the State of Connecticut has power to provide by special laws for the removal of grade crossings, and that the work shall be done by a commission appointed for that purpose, with full power to determine, direct, and carry out the details of the work, and to apportion the expense among the parties responsible for the existence of the nuisance. It is said that the Courts of Connecticut have so decided and that in certain cases this Court has also held such legislation is constitutional.

All that may be conceded, but it does not follow that in appointing and empowering such a commission the legislature is

absolutely free from all constitutional limitations, or that merely by entitling an Act, as one for the removal of grade crossings, it can preclude all judicial inquiry into the real objects of the measure, and thus, in direct violation of the Constitution of the State, not only sanction, but enforce municipal contribution to general railroad construction.

We say it is clearly obvious, from a mere inspection of the Act itself, that its grade crossing figurehead is only a disguise, under which its author and promoter, the railroad company, has attempted to compel the citizens of Bridgeport to contribute four hundred thousand dollars to the improvement of its plant—the building of new embankments, the laying out of new tracks, the construction of spur-tracks at grade to feed its freight business, the acquisition of land for tracks and depot, the improvement of its curves and the construction of a new and costly drawbridge—all of which purposes have no necessary connection with, and some of which, are absolutely inconsistent with grade crossing elimination.

This we say makes the Act unconstitutional and all proceedings under it void, and therefore not due process of law.

Again, we insist that the Act is unconstitutional in the mode which it provides for the apportionment of the expense.

This, by the terms of the Act, is to be done by the railroad company, in connection with three persons named in the Act.

In order to make it seem more plausible, it was graciously stipulated that the city and the railroad company might, within six months after the passage of the resolution, agree upon upon all the details of the work and the apportionment of the expense.

See section 2 of the resolution as set out in the brief and statement filed upon this motion in this Court.

It should be constantly borne in mind that the application

for the appointment of appraisers, which constitutes this action, expressly alleges that such an agreement was in fact made and that the application was made pursuant to said agreement, and the Act under which it is alleged to have been made. When, however, upon the trial of the case in the Supreme Court, we urged the errors committed in the hearing before the Judge, in his rulings upon questions of evidence in support of that allegation, and in the conclusions as matters of law reached by him upon that evidence, the Supreme Court declined to pass upon the question, holding that it was entirely immaterial whether the city made, approved, assented to, or had anything to do with the alleged agreement; in short that the Act did not contemplate any agreement, but that the three men named and the railroad company together had power as a commission without the approval of the city, or its taxpayers, or anyone actually representing them to make this plan and carry it through, and to exclusively and finally determine what proportion of the expense the city should pay.

We contend that this central and controlling feature of the Act, about which all the rest of it turns and which cannot be separated from its other features, renders the whole scheme unconstitutional.

It cannot be denied that this commission was to perform, and did perform judicial functions between the city and its taxpayers and the railroad corporation.

The Act assumed that there was a joint responsibility of the city and the railroad company for the existence of grade crossings, but in what proportion they were so chargeable and how much of the expense of removal each ought in justice to sustain, the Act does not decide. That was left to this so-called commission. And upon this so-called commission thus empowered to act judicially and finally, with no provision for an appeal, and upon which the city had no actual representative, the railroad company sat as one of the judges.

It is true that it was provided that the agreement should be submitted to the railroad commissioners for their approval, but there is no provision for a hearing before them of the parties in interest; nothing looking to an adjustment of rights between the city and the railroad company, and this, apparently upon the theory that the rights of the parties had been settled by agreement between themselves by the so-called agreement, and that the approval of the commissioners is required only in the interests of the State, or the general public.

At all events, it is plain that there is no such provision here for an impartial hearing upon the question of contribution between the city and the railroad company as must be provided to constitute due process of law.

The railroad company itself, upon a question in controversy between itself and the city, involving millions of dollars, sits as a judge.

It is a violation of first principles which no subsequent hearing upon appeal, even if such were provided, could purge away.

The waters of justice are poisoned at the fountain, and no formal, perfunctory approval by Railroad Commissioners further down the stream can render them pure.

We say it is a violation of that clause of the Constitution of the United States, which provides that no person shall be deprived of liberty or property *without due process of law.*

Says Cooley, in his work on Constitutional Limitations, sixth edition, page 207:

"*A legislative act which should undertake to make a Judge the arbiter in his own controversies, would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible*

authority, neither legislative, executive nor judicial, and wholly unknown to constitutional government."

And again, in the same work, pages 506 and 507, he says:

"There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down, that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for jura naturae sunt immutablia, and they are leges legum.'"

"This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise."

"It is not left to the discretion of a Judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. Nor is it essential that the judge be a party named in the record; if the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damnified by the judgment, he is equally excluded as if he were the party named. Accordingly, where the Lord Chancellor, who was a shareholder in the Company, in whose favor the Vice Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree, on this ground, Lord Campbell observing: it is of the last importance that the maxim that 'no man is to be a judge in his own cause,' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."

Again, on pages 508 and 509, after alluding to certain cases where the principle has been held not to apply the learned author continues:

"And it is very common in a certain class of cases for the law to provide that certain township and county officers shall audit their own accounts for services rendered the public. . . . *but except in cases resting upon such reasons, we do not see how the Legislature can have power to abolish a maxim which is among the fundamentals of judicial authority. The people of the State, when framing their constitution, may possibly establish so great an anomaly, if they see fit; but if the legislature is entrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one to a controversy to decide it for himself, is not within the legislative authority, because it is not the establishment of any rule of action and decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the laws, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.*

Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in the appellate court; and the suit may there be dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party."

We have ventured to quote at such length from this standard authority, because we see from the opinion of this great jurist and constitutional lawyer, how far reaching, how fundamental, and how universal in its application this principle, that no man can constitutionally be made a judge in his own cases, is: that it applies to all proceedings, whether strictly judicial in form or not, in which there is to be determined a question of law or fact or any question of any sort, involving the con-

flicting interest of two or more parties as to their liberty or property.

It applies to Courts technically so called—to judges and juries—but it applies with equal force to inferior tribunals, to boards of appraisers, to committees, to commissioners, and to all cases where the functions to be discharged are wholly or in part, strictly or *quasi* judicial.

We apprehend, therefore, that it applies to this contrivance, this so-called commission, these three gentlemen named and the railroad company, acting as a board or commission in deciding between the City of Bridgeport and its taxpayers on the one hand, and the railroad company on the other, how far, in justice and equity, these parties respectively, are responsible for the existence of this grade crossing nuisance, and what proportion of the expense of its removal, each should bear.

The principle for which we are contending is established and illustrated by numerous decisions.

The Washington Ice Co. of the City of N. Y. vs. Price, Hopkins (N. Y.) Chancery p. 2.
Sigourney v. Sibley, 21 Pick. (Mass.) p. 101.
Hail v. Thayer, 105 Mass., p. 222.
State et al. v. Crane, 26 N. J. L. p. 394.
Lanfear v. Mayor, 23 Am. Dec. p. 477.
Queen v. Justices of Hertfordshire, 6 Queen Beuch, p. 753.
Dyer v. Smith, 12 Conn., p. 391.
Bedell v. Bailey, 58 N. H., p. 62.

ROBERT E. DEFOREST,
GEORGE P. CARROLL,
of Counsel for Plaintiffs in Error.